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## AGENCY POLICY ON LIAISON WITH OVERSEAS SECURITY AND INTELLIGENCE SERVICES IN RELATION TO DETAINEES WHO MAY BE SUBJECT TO MISTREATMENT

### Overview

1. The Security and Intelligence Agencies ("the Agencies") do not participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment (referred to in this paper generally as "mistreatment"). They will therefore not carry out any action which it is known will result in torture or inhuman or degrading treatment. At the same time, the Agencies need to work with a range of overseas security and intelligence services ("liaison services") for the proper discharge of their functions. This policy sets out the legal issues on dealing with liaison services where the Agencies' actions might result in an individual's mistreatment in detention at the hands of a liaison service. It suggests practical ways to eliminate or minimise, so far as possible, the risk of such mistreatment and, at the same time, unlawful actions by the Agencies and their staff.

2. The policy does not cover the circumstances in which the Agencies are directly involved in the questioning of an individual in the custody of a liaison service, for which there is separate guidance.

### Key Points

- The Agencies need to develop and maintain close working links with a wide and growing range of liaison services for the proper discharge of their functions. This involves passing, seeking and receiving information.
- The Agencies do not participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment. The Agencies will not carry out any action which it is known will result in torture or inhuman or degrading treatment.
- Where the Agencies foresee a real possibility that their actions will result in an individual's mistreatment, they will consider applying caveats or seeking prior assurances before acting in order to eliminate or minimise the risk of mistreatment.
- Where, notwithstanding any caveats or prior assurances, there is still considered to be a real possibility of mistreatment and therefore there is considered to be a risk that the Agencies' actions could be judged to be unlawful, the actions may not be taken without authority at a senior level. In some cases, Ministers may need to be consulted.

### Context

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3. Under both the Security Service Act 1989 and the Intelligence Services Act 1994 ("the Security and Intelligence Acts"), it is the duty of the Director General and the Chief of SIS respectively to ensure that there are arrangements for securing that no information is obtained or disclosed by the Agencies except so far as is necessary for the proper discharge of their separate functions.

4. The Agencies' functions are set out in section 1 of both of the Security and Intelligence Acts. The functions include the protection of national security, in particular against threats from terrorism.

5. The most substantial terrorist threat currently faced by the UK comes from Al Qaida and from groups affiliated to or inspired by it. This threat is uniquely transnational and requires an international response. Its emergence particularly since September 2001 has led to increased co-operation between governments, including on security/intelligence channels. The need for enhanced international cooperation to combat the threat from Al Qaida and its affiliates was recognised and has been emphasised since September 2001 in, for example, UN Security Council Resolution 1373.

6. In these circumstances, the Agencies need, for the proper discharge of their separate functions, in particular the protection of national security against threats from terrorism, to develop and maintain close working links with a wide and growing range of liaison services. This involves passing, seeking and receiving information.

7. However, the observance of human rights standards by liaison services and states varies. The UK is required, in particular under the United Nations Convention against Torture and customary international law as reflected in the draft articles of the International Law Commission ("the ILC") on State Responsibility, to prevent acts of torture within its jurisdiction and to cooperate to bring to an end acts of torture amounting to serious breaches of the ILC by other states. The Agencies are committed to ensuring so far as possible the observance of human rights by liaison services and work with liaison services to achieve this. In addition, passing information to and seeking and receiving information from liaison services, where this might cause or result in an individual's mistreatment, can in certain circumstances contravene UK law. For all these reasons, it is clearly vital that the Agencies' relationships with liaison services are conducted in a way that eliminates or minimises the risk of mistreatment and therefore that an officer of either Agency could be judged to have acted unlawfully.

#### Policy

8. The Security and Intelligence Agencies do not participate in, solicit, encourage or condone the use of torture or inhuman or degrading treatment. For reasons both ethical and legal, their policy is not to carry out any action which they know would result in torture or inhuman or degrading treatment. Where there is considered to be a risk that the Agencies' actions will be unlawful, the actions may

not be taken without authority at a senior level. In some cases, Ministers may need to be consulted.

## Law


9. The Security and Intelligence Acts require that, before passing information to, or seeking or receiving information from a liaison service, the officer dealing with the case must be satisfied that his actions are necessary for the proper discharge of the particular Agencies' functions. All of the relevant circumstances need to be considered. These will include the potential or anticipated benefits from passing, seeking or receiving the particular information, as well as any potential negative consequences. If the possibility exists that information will be or has been obtained through the mistreatment of detainees, the negative consequences may include any potential adverse effects on national security if the fact of the Agency seeking or accepting information in those circumstances were to be publicly revealed. For instance, it is possible that in some circumstances such a revelation could result in further radicalisation, leading to an increase in the threat from terrorism, or could result in damage to the reputation of the Agencies, leading to a reduction in the Agencies' ability to discharge their functions effectively. Where there is the potential for such negative consequences to outweigh the benefits, advice should be taken as appropriate.

10. Even if the proposed actions satisfy the test under the Security and Intelligence Acts, there are a number of ways in which they might:

- (i) be unlawful under UK criminal law;
- (ii) be unlawful under UK civil law; or
- (iii) put the UK in breach of international law.

### (i) Criminal law

11. Officers of the Agencies will commit a criminal offence where their actions aid, abet or incite the commission of a criminal offence under UK law by a liaison service overseas. The offence committed could be:

- (a) torture;
  - (b) a breach of the Geneva Conventions Act 1957 (torture or inhuman treatment of a detainee entitled to the protection of the scheduled conventions or the first protocol) and of the International Criminal Court Act 2001; or
  - (c) misfeasance in public office.
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(a) *Torture*

12. Section 134 of the Criminal Justice Act 1988 reads as follows:

"a public official or person acting in an official capacity, whatever his nationality, commits the offence of torture if in the UK or elsewhere he intentionally inflicts severe pain or suffering on another in the performance or purported performance of his official duties."

It is immaterial whether the pain or suffering is physical or mental and whether it is caused by an act or an omission: subsection (3).

13. It is an offence for an officer to incite the offence of torture committed by a foreign liaison service. An officer will be guilty of incitement where he intends to incite torture by his actions or, possibly, where he knows or believes that torture will result from his actions. For this purpose, deliberately closing one's eyes to the consequences of one's actions is deemed to be the same as knowing those consequences.

14. It is an offence for an officer to aid or abet the offence of torture committed by a foreign liaison service. An officer will be liable for aiding and abetting torture if he intends to and wilfully does encourage it and torture is caused by his actions. The offence of aiding and abetting torture might also be committed where the Agencies engage in a joint operation with a liaison service or provide actual assistance to that liaison service, e.g. by providing [REDACTED]. In those circumstances, an officer who engages in a joint operation or provides assistance, without having attached an appropriate caveat or secured the necessary assurances (see further paragraphs 35 to 37 below), may aid or abet torture if he knows or believes that the liaison service will commit torture and his conduct is capable of assisting that torture and torture does in fact result.

15. In the context of these offences, the human rights record of the state and liaison service in question will of course be a relevant factor, although there is a difference between what is known and what is rumour and unproven reporting.

(b) *Breach of the Geneva Conventions Act 1957 and the International Criminal Court Act 2001*

16. Under section 1 of the Geneva Conventions Act 1957:

"Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the scheduled conventions or the first protocol shall be guilty of an offence".

17. The scheduled conventions are the 1949 Geneva Conventions I to IV and the first protocol refers to the 1977 Geneva Protocol I. These apply to prisoners of war,



civilians in detention and certain other categories of person. For the purposes of this offence, the status of the detainee will therefore be critical. However, the offence will only apply in situations arising out of armed conflict.

18. Any torture or inhuman (but not degrading) treatment of a detainee entitled to the protection of the scheduled conventions or the first protocol will amount to a "grave breach" under the Act and therefore a criminal offence. An officer may aid, abet or incite the offence in the same way as described in paragraphs 13 and 14 above.

19. It will also be an offence under the International Criminal Court Act 2001 to aid, abet or incite a person to commit a "war crime". War crimes include grave breaches of the Geneva Conventions.

(c) *Misfeasance in public office*

20. One other offence could also be committed. The common law offence of misfeasance in public office can be committed where a public official wilfully neglects to perform a duty which he is bound to perform by common law or statute. It is conceivable that this offence could be used to prosecute public officials who have sanctioned torture in some way. However, the offence is unlikely to cover situations not caught by the above offences and so does not need to be considered further for the purposes of this paper.

(ii) Civil law

(a) *Section 6 of the Human Rights Act*

21. Under section 6 of the Human Rights Act 1998 it is unlawful for a public authority to commit torture, or to inflict inhuman and degrading treatment, as this would be incompatible with a convention right: Article 3 of the European Convention on Human Rights ("the ECHR"), the prohibition of torture. However, for the Act to apply in relation to detainees held overseas, the UK would need to be in "effective control" of the area in which the detainee was located, as the primary jurisdiction of the Act is territorial. The Act is therefore unlikely to apply in the situations covered by this policy.

(b) *Trespass against the person and false imprisonment*

22. Mistreatment and torture could also amount to the tort of trespass against the person or possibly false imprisonment. In theory, a victim of such mistreatment could bring an action for damages against either the Agency or their officers, where an officer had instigated a foreign liaison service to carry out an act which caused the torture or mistreatment of an individual and those consequences were reasonably foreseeable. A civil action could also be brought in similar circumstances on the basis of misfeasance in public office. The remedy for such actions would be damages.

(iii) International law

23. The UK is a signatory to the United Nations Convention against Torture ("UNCAT") (as well as related provisions on torture in the ECHR and the International Covenant on Civil and Political Rights ("ICCPR")). Article 2 of UNCAT prohibits torture. Article 1 defines torture as:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent of a public official or other person acting in an official capacity."

24. UNCAT requires States to take effective measures to prevent acts of torture within its jurisdiction. UNCAT's requirements are met by the UK through the creation of the criminal offence of torture (as above). However, where the actions of members of the Agencies amount to this offence, those actions could also lead to a finding that the UK was in breach of UNCAT.

25. Both the ECHR and the ICCPR also contain prohibitions against torture and inhuman and degrading treatment. However, as these only apply where a detainee is subject to the UK's jurisdiction, they are unlikely to apply in the situations covered by this policy.

26. The UK might be liable under international law where the actions of members of the agencies provide aid or assistance to another State with a view to facilitating the commission of an internationally wrongful act (see Draft Article 16 of the Articles on State Responsibility adopted by the International Law Commission). However, this would only apply where the members of the agencies act, knowing of the proposed internationally wrongful act and with a view to facilitating it, and their aid or assistance actually facilitates the wrongful act. While the legal position is not clear, where information is received under an ongoing liaison arrangement from a country known to use torture systematically, there could also be a risk that the UK would have failed to comply with its duty under customary international law (as reflected in draft article 41 of the ILC's draft articles on State responsibility) to cooperate to bring an end to the use of torture in such a State. However, the risk of a breach would be significantly reduced where positive steps are taken to try to prevent torture by obtaining credible assurances. There would be no breach of this duty where, for example, sporadic use of torture might be suspected.

#### Roles and responsibilities

27. All relevant agency staff should ensure that they are familiar with the guidance in this paper, together with any related advice circulated by the Agency. Nominated staff will be responsible for deciding whether to proceed in cases where

there is considered to be a risk of mistreatment and they will also be required to form judgments about the adequacy of caveats and assurances. In cases of particular difficulty or sensitivity, or where there is considered to be a risk of mistreatment notwithstanding any caveats or assurances, the decision should be referred to nominated senior staff.

28. The Legal Advisers in both Agencies will be able to advise on any legal issues that arise in particular cases. These will include whether what is known about a particular state or liaison service, or what is known in a particular case, means that there is foresight of a real possibility of mistreatment. The LAs will also be able to advise whether anticipated consequences amount to torture or mistreatment. (For instance mistreatment can include treatment other than physical injury. It can include mental cruelty and could potentially arise from indefinite and unlawful detention.) Advice can also be given on the status of a detainee and whether he is entitled to the protection of the Geneva Conventions. They will also be able to advise on the adequacy of any caveats or assurances that have been received.

#### Procedure

29. Different considerations will apply depending on whether the Agencies:

- (1) pass information to a liaison service, which may result in an individual's detention or be used in the questioning of an individual in detention, or when seeking information from a liaison service, which may be obtained from an individual in detention; or
- (2) receive information from a liaison service, which may have been obtained from an individual in detention.

#### (1) Passing or seeking information

30. The officer must consider whether his actions might result in the torture or mistreatment of an individual. He needs to identify which of the following is the case:

- (a) he knows that his actions will not result in torture or mistreatment or he does not foresee a real possibility that such consequences will result;
- (b) while he does not know, he foresees a real possibility that the consequences of his actions will include torture or mistreatment; or
- (c) he knows what the consequences of his actions will be and those consequences include torture or mistreatment.

(a) *He knows that his actions will not result in torture or mistreatment or he does not foresee a real possibility that such consequences will result*

31. In accordance with standard practice, before passing any information to a

liaison service, an officer should always attach the standard liaison caveat to the information: "This information has been communicated in confidence to the recipient government and shall not be released without the agreement of the British government".

32. Where the officer does not foresee a real possibility that the consequences of his actions will include torture or mistreatment, or where he knows that such consequences will not result from his actions, no further caveats are necessary. To proceed will be lawful.

33. The critical question is what steps should the officer take to inform himself before deciding whether he foresees a real possibility. Whilst there is no legal obligation on staff to seek out potentially relevant information, the officer should ensure that he is reasonably well informed of the practices of particular states and liaison services.

(b) *While he does not know, he foresees a real possibility that the consequences will include torture or mistreatment*

34. If the officer foresees a real possibility that his actions will result in torture or mistreatment, he must refer the matter to his senior line management before proceeding further.

35. Line management may conclude that there is not a real possibility that mistreatment will occur, in which case the officer may proceed. But if line management share the assessment of the officer, they should consider attaching a further caveat to the information or request, in addition to the standard liaison caveat set out above. A further caveat could be to the effect that, as appropriate:

- (i) the information should not be used as the basis for executive action;
- (ii) the information should not be used as the basis for questioning any individual;
- (iii) if the information is to be used as the basis for questioning any individual, such questioning should conform with international legal standards;
- (iv) the information sought should not be obtained from any individual in detention; or
- (v) if the information may be obtained from any individual in detention, the questioning of him should conform with international legal standards.

36. However, a caveat is only of value if the officer believes that it will be observed, so that it eliminates the risk that an individual might be mistreated as a



result of his actions.

37. If it is not thought that caveats alone will suffice, management should consider seeking specific assurances from the liaison service in question to prevent any mistreatment occurring. Any assurances must be reliable and credible: an assurance which will not be observed is of no value. However, once such apparently reliable assurances have been received, the intended action may be authorised and may proceed. It will be lawful.

38. If it is not considered possible to obtain reliable assurances, or if there is any doubt about the reliability of assurances received, the matter should be referred to senior management before proceeding further. Senior management, having taken advice from the LAs as they judge necessary in the particular circumstances, will decide whether to authorise the proposed action. They will balance the risk of mistreatment and the risk that the officer's actions could be judged to be unlawful against the need for the proposed action. All of the relevant circumstances will be taken into account. These will include the operational imperative for the proposed action, such as if the action involves passing or obtaining life-saving intelligence, the level of mistreatment anticipated and how likely those consequences are to happen. In particularly difficult cases, senior management may need to refer the matter upwards, and in some cases it may be necessary to consult Ministers. This process is designed to ensure that appropriate visibility and consideration of the risk of unlawful actions takes place.

(c) *He knows what the consequences will be and those consequences include torture or mistreatment*

39. The procedure is initially the same as for (b) above, with the matter being referred upwards as required. However if, even with the use of caveats and/or assurances, it is known that the consequences will include torture or mistreatment then the action will not be allowed to proceed. The Agencies will not authorise any action which it is known will result in the mistreatment of an individual.

(2) Receiving information

40. It is unlikely that any single instance of acceptance by an officer of information from a liaison service will amount to a criminal offence or a breach of civil or international law.

41. However, it is possible that receiving information from a liaison service, via correspondence or liaison meetings, could incite that liaison service to mistreat detainees in order to maintain or develop the liaison relationship. For example, a liaison service knowing that the Agency was interested in obtaining further information from a detainee might incorrectly conclude that the Agency would want them to obtain it, if necessary, through torture or mistreatment.

42. Where the Agency knows or has reason to believe that a particular liaison

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service uses torture or other mistreatment to obtain information, the Agency should consider obtaining assurances, before continuing to receive such information. If it is not considered possible to obtain reliable assurances, or if there is any doubt about the reliability of assurances received, senior management, taking advice from the LAs as required, must decide whether to continue to receive such information. As above, all of the relevant circumstances will be taken into account. In particularly difficult cases, senior management may need to refer the matter upwards, and in some cases it may be necessary to consult Ministers. This process is designed to ensure that appropriate visibility and consideration of the risk of unlawful actions takes place.

43. In any case where a credible allegation or other information is received that torture or other mistreatment has been used on a detainee, this should be drawn to the attention of relevant managers. Where that detainee has provided information to the Agency, it will also alert other relevant Departments, Agencies and Ministers. The particular Agency will also consider whether to raise the allegations with their own contacts within the particular liaison service. If such an allegation or information is received in a case where assurances have been obtained, this would also have implications for the credibility of any future assurances from that liaison service.

#### Reliability and use of detainee information

44. The circumstances in which detainee information has been obtained will be relevant in assessing its reliability. Accordingly, the Agency should wherever possible seek as much context as possible, particularly if the intelligence is threat-related. However, the Agencies' ability to do this is often limited and, in any event, they may not press to be told the precise sourcing where to do so might damage co-operation and the future flow of intelligence from the liaison service in question.

45. It is established as a matter of law that information may be used as the basis for operational action, whatever the circumstances in which it has been obtained. However, where it is established that information has been obtained by torture, it is not possible to rely on that information in legal proceedings, for instance to justify the Agency's operational actions or to support the taking of steps against an individual, such as deportation or exclusion. LAs are able to advise on the possible application of this evidential bar in particular cases.

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